

Case No. 4:12-CR-00600-01

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
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EARNEST GIBSON III,
Petitioner Pro-Se-Defendant,

vs.

UNITED STATES OF AMERICA,
Respondent-Plaintiff.

PETITIONER'S MOTION TO AMEND
MEMORANDUM OF LAW IN SUPPORT OF THE
PETITION UNDER U.S.C. § 2255

The Honorable Lee H. Rosenthal, U.S. District Judge

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Petitioner Pro-Se-Defendant

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EARNEST GIBSON III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondant.

CRIM. ACT. NO. 4:12-CR-00600-01

CIVIL NO. 419-CV-2143

Honorable Judge Lee H. Rosenthal
United States District Judge

PETITIONER'S MOTION TO AMEND § 2255

I. EVIDENCE OF GOVERNMENT'S UNJUST ENTRAPMENT OF PETITIONER

Accordingly, the Petitioner Amended his 28 U.S.C. § 2255 motion on, 6/18/19. Whereas, the Petitioner cited 18 U.S.C. § 171(b). Thus, in his amended § 2255, the Petitioner contends that the government's withholding, Highly Secretive Confidential Evidence from the Petitioner was a violation of his Due Process Constitutional Rights. Therefore, the Petitioner hereby amends his § 2255 to provide additional evidence of the government's unjust entrapment of the Petitioner. For example, the government's highly secretive multiple gratuitous payment(s) for official act(s), 18 U.S.C. §201(f) were kept secret from the (1) Petitioner (2) Court and (3) Jury.

Therefore, the Petitioner was Denied his Due Process Right to Request the Defence of Entrapment. For example, in United States v. Sol Cohen, 431 F.2d 830; 1070 U.S. App. Lexis 7468; appeal for the second circuit, the court ruled "The evidence need only show that a government agent initiated the payment, not the amount of pressure the agent applied to justify an instruction on defendant's entrapment defense. Thus, the court reversed the conviction.

It is unlawful for any person acting on behalf of the government to promise, offer, or causes or procures to be promised, offer or given, any money, or other thing of value with the intent to influence or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his Official Capacity, or in his place of Trust or Profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud or make opportunity (1909 U.S. Lexis 4) for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty.

For example, U.S. Rev. Stat. § 545 (U.S. Comp. Stat. 1901, p. 3680) makes it a crime to bribe any person acting for the United States in any official function to induce him to do or omit to do any act in violation of his lawful duty. The words "lawful duty" are not to be considered as duty imposed by law or statute, but as duty lawfully imposed in any way.

Whereas, in the Petitioner's case the government's highly secretive confidential investigation knowingly violated 18 U.S.C. §

1320a-7b Criminal Penalties For Acts Involving Federal Health Care Programs. However, after the government secretly confidentially (1) Caused the participants be kept secret, (2) Paid the participants to commit fraud, (3) Falsified records to cause the Petitioner to be charged with "Deliberate Indifference."

Therefore, all of the government's "highly secretive investigation was in violation of 18 U.S.C. § 220 Illegal Renumerations For Referrals To Recovery Homes, Clinical Treatment Facilities And Laboratories. For example, the Petitioner's employer, Riverside General Hospital, owned Clinical Treatment Facilities (i.e. PHP's). Thus, the governemnt secretly paid vulnerable elderly Africian Americans to attend treatment at these facilities (i.e. PHP(s)).

In addition, the government caused these patients, that live in these Personal Care homes to attend the Clinical Treatment Facilities (PHP(s)). Accordingly, the government also paid for the referrals to laboratories. For example, relative to these vulnerable elderly patients the government paid these elderly patients in cash ("Directly," "Bribe") to attend the PHP(s) to undergo Psychiatric, Mental Health and Substance Abuse Treatment.

II. RELEVANT CASE IN GOVERNMENT FRAUDULENT SCHEME

"Defraud," meant not only pecuniary loss but included any defeat of lawful governmental function, such as defrauding United States of doing justice. Outlaw v. United States, (1936, CA5 Tex) 81 F.2d 805 cert den (1936) 298 US 665, 80 L. Ed. 1389, 56 S. Ct. 747.

It was immaterial whether acts were crime independent of conspiracy statute, if there was shown conspiracy to defraud United States. United States v. Whalan, (1868, DC Mass) 28 F Cas 531, No 16669.

Defrauding United States was not limited to conspiracies to frauds as to revenue, but applied to property and rights. United States v. Owen, (1887, DC Or) 13 Sawy 53, 32 F 534.

Term "defraud" as used in 18 U.S.C.S. § 371 not only reaches schemes that deprive government of money or property but also protects integrity of U.S. and its agencies, and § 371 covers acts that interfere with or obstruct lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest; four elements of Klein conspiracy are (1) defendant entered into agreement with one or more people, (2) to obstruct lawful government function, (3) by deceitful or dishonest means, and (4) committed at least one overt act in furtherance of conspiracy. Coluccio v. United States, (2004, ED NY) 313 F.Supp. 2d 150, 93 AFTR 2d 1944.

Accordingly, the Petitioner contends the governments withholding its secret confidential scheme from Petitioner, Court and Jury, and requesting "Deliberate Indifference" jury instructions, was "Entrapment." Whereas the government was the principal in the Petitioner's case. Thus, the government knowingly and intentionally violated the "Adverse Agent Doctrine." For example, the rule that an agent's knowledge will not be imputed to the principal if the agent is engaged in fraudulent activities that is part of the fraud.

Nevertheless, the government was the principal but with the unfair jury instructions of "Deliberate Indifference" the government caused the Petitioner to be principal.

Although proof of predisposition to commit crime will bar application of entrapment defense, fundamental fairness aspect of due process will not permit any defendant to be convicted of crime in which police conduct in arranging circumstances which led to commission of crime was "outrageous." United States v. Twigg (1978, CA3 NJ) 588 F.2d 373 (critized in United States v. Berg (1999, CA8 Mo) 178 F.3d 976) and (critized in United States v. Diaz (1999, CA10 NM) 189 F.3d 1239, 1999 Colo J C A R 5385)

Government infiltration of criminal activity is recognized and permissible means of investigation even where government agents supply something of value to criminal since such supply may be necessary to be taken into confidence of illegal entrepreneur; however, government may not instigate criminal activity, provide place, equipment, supplies and know-how, and run entire operation with only meager assistance from defendants without violating fundamental fairness. United States v. Tobias, (1981, CA5 Ala) 662 F.2d 381, cert den (1982) 457 US 1108, 73 L Ed 2d 1317, 102 S Ct 2908.

It should be noted that on "multiple occasions with highly sophisticated equipment the government attempted to cause the Petitioner to commit a fraudulent act (See Confidential Source Withlow evidence, both telephone and video etc, IRS Agent Kheif testimony and affidavit_ _). However, "Over and Over," again and again the Petitioner refused to commit the government's induced crime. However,

the government objected to admission of its entrapment evidence during trial.. In addition, during deliberation, the jury requested to see "Entrapment Evidence." However, the request was denied.

The "shock the conscience" standard typically is employed when determining whether governmental action violates due process rights under the Fifth and Fourteenth Amendments. In a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. The U.S. Supreme Court has said that the "shock the conscience" standard is satisfied where the conduct was intended to injure in some way unjustifiable by any government interest, or in some circumstances if it resulted from deliberate indifference.

The "shock the conscience" standard is not reflected in Fed. R. Crim. P. 52(B) itself, not in how the U.S. Supreme Court has applied the plain-error doctrine. The Court repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below. The Court also routinely remands cases involving inadvertent or unintentional errors, including sentencing errors, for consideration of Olano's fourth prong with the understanding that such errors may qualify for relief. The U.S. Supreme Court has never said that Fed. R. Crim. P. 52(B) errors amount to a powerful indictment of the system. (Sotomayor, J., joined by Roberts, Ch. J., and Kennedy, Ginsberg, Breyer, Kagan, and Gorsuch, JJ.)

The Supreme Court has held that government agents may not, in

their zeal to enforce the law, originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute. Where the government has induced an individual to break the law and the defense of entrapment is at issue, the Supreme Court ruled, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents. In considering the application of the entrapment defense where acts once legal had been made criminal violations, the Supreme Court noted that evidence of a predisposition to do what once was legal is not, by itself, sufficient to show predisposition to do what was now illegal, for there was a common understanding that most people (i.e. Earnest Gibson III) obey the Law even when they disagree with it.

Federal law independently forbids criminal convictions that rest upon entrapment. United States v. Jimenez Recio, 537 US 270, 154 L.Ed 2d 744, 123 S Ct 819.

The recognition of the defense of entrapment in federal courts was reaffirmed in Sherman v. United States (1958) 356 US 369, 2 L Ed 2d 848, 78 S Ct 819, *infra* §4[d], where the court cited the decision in Sorrells v. United States, *supra*, and stated that the intervening years had in no way detracted from the principles underlying that decision. Entrapment, the Supreme Court added occurs only when the criminal conduct in question was the product of the creative activity of law enforcement officials, and a line must be drawn between the trap for the unwary innocent and the trap for the

unwary criminal. In this regard, the Supreme Court stated, the accused may examine the conduct of the government agent, and on the other hand, the accused will be subjected to an appropriate and searching inquiry into the accused's own conduct and predisposition as bearing on the claim of innocence. For example, in the Petitioner's case the government was unable to convince the Petitioner to commit a crime. Therefore, the government was forced to request a "Deliberate Indifference Jury Instruction." For example, "quoting Jacobson and Mayfield," the court said that persistence by government agents conducting a sting operation is part of an inquiry into inducement because the courts are concerned that, if "additional efforts at persuasion" are required to convince someone to commit a crime, "then the result will be 'the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law.'"

"The point is that the government is supposed to catch criminals, not create them. The government's conduct here, including its persistence, posed an impermissible risk that Barta's criminality was created rather than caught," the court held.

Chief Judge Diane P. Wood and Judge Richard A. Posner joined the court's opinion.

III. 18 §1505 "OBSTRUCTION OF JUSTICE"

"Lack Qualification (i.e. How can you know something kept secret.) The Petitioner contends that his Mens Rea demonstrated that he would not participate in criminal activities (i.e. Medicare

Fraud). Therefore, the government had to secretly create a Medicare fraud scheme. However, the government then to utilized the "Deliberate Indifference" jury instruction to entrap and ascertain a conviction of the Petitioner.

Incidentally, the (9th Cir. 2005) was one of the first Appeal Courts' (U.S. v. Jewell 9th Cir. 1976) to utilize willful blindness have since restricted the circumstances under willful blindness instructions will be issued.

"In the years since we decided Jewell, we have restricted the circumstances under which we will permit the instruction to be issued. We have warned that the instruction is "rarely appropriate," and should be given only when the government presents "specific evidence" that the defendant "(1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution," ... It is not enough that the defendant "was mistaken, recklessly disregarded the truth or negligently failed to inquire." ... The instruction should therefore "be rarely given because of the risk that the jury will convict on a standard of negligence: that the defendant should have known the conduct was illegal. "The purpose of the Jewell instruction is.... for those cases of "willful blindness," where the defendant "suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended." Consequently, the Petitioner contends that the

government withheld its Highly Secretive Confidential Scheme from the Petitioner to assure his "Entrapment."

Furthermore, for the purpose of "Entrapment" the Petitioner contends that the government secretly highest level confidential investigation with the use of "Deliberate Indifference" Jury Instructions violated his Due Process Rights. Thus, the government violated Earnest Gibson III's Innocent Agent Rights." Accordingly, the Petitioner had no knowledge of the principal "The Government" illegal purpose. Likewise, the government's "Top Secretive PHP scheme denied the Petitioner (i.e. "Innocent Agent"..) the right to demonstrate his Men Rea culpability. Similiarly, since the government's conduct was totally concealed from the Petitioner, he was denied the Right of Actig. (a) purposely (intentionally) (b) knowingly, (c) recklessly, or negligently (§2.02(2)). Therefore the Petitioner contends he is Not Guilty (i.e. "Deliberate Indifference"...) of any Criminal Medicare Fraud Statutes or Regulations because Earnest Gibson III did not act with disregard to any of these four types of culpabilities, as the statute requires (§2.02(2)). In addition, the Petitioner contends that the government was keenly aware of his History of Complying with the Laws, Statutes, Rules and Regulations (i.e. See Ex 13) Therefore, the government was thereby "Secretly Forced to endanger "Vulnerable Older African Americans to cause entrapment of the Petitioner with its "Deliberate Indifference" "Jury Instructions." In violation of Trial § 298-jury instruction-witness tampering (in 18 U.S.C.S § 1512(b)) (2)(A) or (B).

To constitute fraud on court, fraud must be part of unconscionable plan or scheme, or subvert integrity of court itself; such plan cannot be garden variety fraud—it must rise to level of bribing judge, jury tampering, designing scheme intended to deceive court, or involvement of officer of court in perpetrating fraud; fraudulent act must be intentionally false, wilfully blind to truth, or in reckless disregard for truth. Bowie v. Maddox, 677 F. Supp. 2d 276, 75 Fed. R. Serv. 3d (Callaghan) 938 (DC Dist Col 2010). United States v. Price, 783 F.2d 1132, 113941 (4th Cir. 1986) (new trial required where informant was more than a "mere tipster," having been necessary party to an attempted illegal sale, and defendant wished to present defense of duress or entrapment perpetrated by informant).

IV. EVIDENCE OF GOVERNMENT DELIBERATE INDIFFERENCE ENTRAPMENT

Accordingly, this 28 U.S.C. § 2255 motion will also inform this court how the government with the highest Level Secret Investigation caused the Petitioner's work for his employer (i.e. Riverside Hospital) to be inferred as false. However, the Petitioner's performance complied with all required statutes and regulations. Nevertheless, the government contends that the illegal work conducted on behalf of the government should then be inputed to the Petitioner. Whereas, the government took the initiative of inducing the Petitioner to it's Fraudulent Scheme by assuring that Petitioner would remain "wilfully blind" (i.e. "Deliberate Indifference"). For example, the government was keenly aware that the Petitioner was not Pre-disposed to Fraud the government.

Although such false evidence should have been inputed to (1)

The Physician, (2) Healthcare Professionals, (3) Personal Care Home Owners, (4) Medical Staff Executive Committee, (5) The Hospital Board of Trustees. Nevertheless, unjustly, all of the government fraudulent created evidence, was then utilized to wrongfully and unjustly accuse the Petitioner of being "deliberate indifference." Therefore, the Petitioner contends that if he was already a "participant, why create the crime to unjustly accused the Petitioner." In addition, the government's Highly Secretive Scheme was an example of the highest level of inhumanity.

Therefore, no real human being in America could imagine nor tolerate such inhumane behavior. (i.e. "Secret Human Rights Violations")

Thus, the government had to suborn perjury with evidence ascertained in the Abuse of these "Older African American Men and Women." For example, the government created it's own PHP facility (i.e. PHP's, "Enslavement of these Vulnerable Americans in their own facility.") Accordingly, the government maintained exclusive authority over these vulnerable elderly humans. Incidentally, it should be noted that the government sponsored "Personal Care Home(s)" were located in a distance far far from where the Petitioner was employed. Accordingly, the government's PHP Dynamic facility was also located in a distance far from where the Petitioner was employed.

Thus, if the government was confident that the Petitioner would participate in it's unlawful scheme, why hide their locations from the Petitioner.. (i.e. thus "Entrapment")

Thus, the government maintains that the Petitioner was "willfully blind" (i.e. "deliberate indifference"). However, it was the government who assured that the Petitioner remained in the blind during the investigation, trial, and sentencing. Accordingly, the government cause the Petitioner's truth of complying with the truth, to be flase in the courtroom during his trial. ("Entrapment")

Whereas, as previously noted, the Petitioner complied with all the rules, statutes and regulations, he was employed to perform. In addition, the Petitioner implemented a successful compliance program on behalf of his employer. (i.e. See Grand Jury testimony of Syretta Early...). Therefore, the government caused the Petitioner to unknowingly perform and apply legal work to the government's fraudulent scheme. (i.e. "Entrapment"). Accordingly, the government caused the Petitioner to explain to the court and the jury (i.e testimony) how he had attempted to legally perform his duties. However, he had no knowledge of the government's fraudulent scheme. In addition, the government had secretly lied to the court, that the Petitioner had been doing wrong for 30 years. However, what the government failed to tell the court was, ("The Truth") that, the Petitioner, had been doing right for 30 years. (i.e. See Investigation of Earnest Gibson III, Ex 12,13) Therefore, such government conduct caused the "injust entrapment" of the leagal responsible work performed by the Petitioner.

To constitute fraud on court, fraud must be part of unconscionable plan or scheme, or subvert integrity of court itself; such plan cannot be garden variety fraud--it must rise to level of bribing.

judge, jury tampering, designing scheme intended to deceive court, or involvement of officer of court in perpetrating fraud; fraudulent act must be intentionally false, wilfully blind to truth, or in reckless disregard for truth, Bovie v. Maddox, 677 F. Supp. 2d 276, 75 Fed. R. Serv. 3d (Callaghan) 938 (DC Dist Col 2010). United States v. Price, 783 F.2d 1132, 113941 (4th Cir. 1986) (new trial required where informant was more than a "mere tipster," having been necessary party to an attempted illegal sale, and defendant wished to present defense of duress or entrapment perpetrated by informant.

Accordingly, the government denied the Petitioner any evidence (1) The Secret Locations (PHP(s)), (2) Personal Care Home Owners, (3) "Money to 'Pay' Vulnerable Older Patients, (4) Access to Secret Patients, (5) Knowledge of the Highly Secretive Staff (i.e. Confidential Human Sources, the Highest Human Secret Sources for the Government, Informants etc...), (6) False Information Provided to Physicians and Health Care Staff, (7) Falsefied Audits By Government. However, after Secretly withholding all such evidence during the investigation the government unjustly accused the Petitioner as being "Deliberate Indifference."

Consequently, the government caused what was supposed to be actual factful "Legal Work" to be false as a result of government created "Probative Evidence," thereby assuring a false entrapment of the Petitioner. Whereas, the government caused false evidence to be presented to the court. Accordingly, the government, (1) Created

the Hospital's false PHP scheme, (2) Ascertained the funds, (3) Executed the conspiracy, (4) Provided the staff, and (5) Falsified the records.

For example, "The court reversed the conviction as noted that evidence needed show only that the government agent initiated the payment." (U.S. Court of Appeals for Second Circuit (431 F.2d 830; 1970 U.S. App. Lexis 7468)).

It should be noted that all such violations occurred by the government after the Petitioner had retained legal counsel. In fact, the government had meeting(s) with the Petitioner's Counsel on multiple occasions knowing that the Petitioner had already retained legal representation.

The Petitioner on multiple occasions resisted the government's repeated attempts to coerce Earnest Gibson III to violate the law. (i.e. Pay for Patients).

Therefore, the government violated the Petitioner's "Home" to voluntary act ("Mens Rea") that violates statutes and regulations prohibited by law (i.e. Paying Patients to Attend PHP's etc...).

However, the Petitioner "just like the public" expected the "Government" to "Protect" all "Human Beings" Constitutional Rights (i.e. including Elderly Mental Health Patients entitlement to medical and Psychiatric care). For example, the Supreme Court reversed "Jencks v. United States", whereas, the government failed to produce secret "F.B.I. Reports." Whereas, the Supreme Court ruled "if the govern-

ment exercised its privilege to withhold reports in the public interest, 'the criminal action must be dismissed.' For example, as noted in the Supreme Court."

"CLASSIFIED TO U.S. SUPREME COURT DIGEST, LAWERS EDITION"

Discovery and Inspection § 13-Accused Right To Production Of Documents In Government's Possession.

(1) Even though no preliminary foundation of inconsistency between the trial testimony of government witnesses and reports in possession of the government containing statements made by these witnesses is laid, the defendant in a criminal case is entitled to production of these reports for his inspection where a sufficient foundation is established by the testimony of the witnesses that their reports were of the events and activities related in their testimony

Discovery and Inspection § 13- Of Documents In Government's Possession Prerequisites.

(2) The necessary essentials of a foundation for an accused's right to production for inspection of documents in the government's possession are that his demand is for production of specific documents containing statements taken from persons of informants offered by the government as witnesses at the trial, and not for any fishing expedition of the chance that something impeaching the testimony of the testimony of the witnesses may turn up; for production purposes it

need only appear that the evidence is relevant, competent, and outside of any exculsionary rule.

The Supreme Court ruled that the United States' trial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and "not by any outside influence," whether of private talk or public print. (i.e. Not Secret Confidential Invsetigation...)

Consequently, in the Petitioner's case the government denied the Petitioner all of the following evidence (1) The secret locations of the PHP's, (2) Locations and names of government secret personal care homes, (3) The names of the personal care owners, (4) The name of each elderly patient forced to attend the PHP, (5) Amount of money paid to each patient, (6) All incentive evidence paid by the government, (7) Names and identity of all of the government's highly secretive staff, (8) False information provided to Physician and Healthcare Professionals, (9) Falsified audits provided by the government.

However, after secretly withholding all such "Evidence" during the investigation, pretrial, during trial, and sentencing, the government unjustly caused the Entrapment of the Petitioner with the "Deliberate Indifference, charge.

THEREFORE, ultimately, the government's highly secretive confidential scheme violated the principle of Mens Rea when it extends a cloak over the actual innocent (i.e Petitioner) and violated the preservation of liberty in the Petitioner's case. Accordingly, the government's highest level confidential schemed accomplished it's

Goal. The government Denied Petitioner any knowledge of it's highly secretive scheme. Consequently, the government's secret behavior assured that Petitioner was oblivious of risk in the PHP(s). Thus, the government assured it's Goal, "Entrapment with Deliberate Indifference charge of the Petitioner."

In addition, Petitioner hereby requests the government to justify its decision to hold the Petitioner "Deliberate Indifference" when according to statute § 424.27 requirement "The Physician, Nurse Practitioner, Clinical Nurse Specialist, or Physician Assistant who reviews the PHP Plan must recertify the plan by signing the medical record. Thus, accordingly, by law all such complaint(s) are then forwarded to either (1) Chief of Medical Staff, (2) Executive Staff Medical Board, (3) Board of Trustees.

However, "None of the eight (8 etc...) indentified were charged nor hled with 'Deliberate Indifference.'" For example, no individual directly responsible for the Patient(s) accused the Petitioner of being "Deliberate Indifference."

As reported in the Petitioner's initial § 2255 motion his case according to the ruling of this Honorable Court is complex. Thus, the Petitioner contends that the secret unlawful abuse by the government enhanced the complexity in the Petitioner's case. Therefore, the Petitioner contends that such highly secretive confidential conduct on behalf of the government and all of its coconspirators enhanced the violations of his Due Process and Constitutional Rights.

Accordingly, the government's secret and confidential misuse of scientific understanding of the human brain and mental illness to force the Patients, Physicians, and Healthcare Professionals to undergo treatment is shocking to the very core of humanity. For example, what is more shocking is the fact the government withheld the evidence from the Petitioner to assure a deliberate indifference conviction (i.e. "Entrapment"). In addition to assure its unjust conviction the government interfered with the Petitioner's access to funds for legal defense (i.e. Attorney's Dick DeGuerin, Katharine Bean...). Thus, the denial of such legal defense funds denied access to (1) Adequate Investigation Staff, (2) Adequate Evidential Defense Materials, (3) Experts in Mental Health that could have assisted in the Investigation of the Government Complex Created Secret Conspiracy Scheme. Consequently, the government's denial of the Petitioner's Legal Funds assured that his Attorney(s) would not have the (1) Funds, (2) Resources, and (3) Materials to Establish an Effective Defense on Behalf of the Petitioner.

The government ignored the substantial medical, ethical and human rights of the elderly (i.e. Older, Vulnerable, African Americans...). Therefore, secretly, the government demonstrated its lack of compliance with the laws of the State, Federal Statutes and Regulations. The government's highly secretive confidential scheme in the Petitioner's case was the foundation of absolute disregard for the Intrinsic value of human life for these vulnerable, older, African American men and woman and the Due Process and Constitutional Rights of the Petitioner.

Accordingly, the Petitioner contends as reported in his initial § 2255 motion the government made multiple attempts to trap him (i.e. see Multiple attempts to contact Petitioner by Cheryl Witlow, FBI informant Ex 19 and IRS Khrief's investigation attempts. Whereas, excerpts from the Petitioner's unlawful contacts were utilized during trial. In addition, as noted by Petitioner's Attorney Dick DeGuerin, these statements clearly violated the Petitioner's Sixth and Fourteenth Constitutional Rights. See e.g., United States v. Henry, 447 U.S. 264, 65 L. Ed. 115, 100 S. Ct. 2183 (1980), Brewer v. Williams, 430 U.S. 387, 51 L. Ed. 424, 97 S. Ct. 1232 (1972); Massiah v. United States, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964).

Whereas, the Petitioner contends that the government, with Highly Secretive and Confidential Proximate Evidence caused the violation [42 §§ 1397 "Elder Justice..."]. However, "The Government unjustly with its violation of Criminal-Instrumentality Rule falsey accused the Petitioner of [42 §§ 1397 (A)(B), "Illegal Renumerations ..."]. Accordingly, the Petitioner was an Employer of the corporation (i.e. Riverside Hospital...). The Petitioner did not use his position to unjustly enrich himself.

§ 0.735-18 General conduct prejudicial to the Government.

They are expected to conduct themselves in a manner which will reflect favorably upon their employer. Although the Government is not particularly interested in the private lives of its employees, it does expect them to be honest, reliable, trustworthy, and of good character and reputation. They are expected to be loyal to the Government, and to the department or agency in which they are employed.

(b) Specific policy. An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

(c) Regulations applicable to public buildings and grounds. Each employee is responsible for knowing and complying with regulations of the General Services Administration and of the Department of Commerce applicable buildings and grounds.

§ 0.735-19 Reporting undue influence to superiors.

It should be noted that the Petitioner did not receive such notification from any Governmental Source.

Thus to assure an unjust conviction of the Petitioner's Employee Rights the Government also caused the violation of § 240.106-5 Employment of Manipulative and Deceptive Devices. Accordingly, the Government unlawfully directly and indirectly with its Highly Secretive and Confidential Scheme utilized instrumentality of interstate commerce or U.S. Mail in violation of the Social Security Act. Whereas the Government employed the Secret Confidential Scheme of paying patients to attend PHP Psychiatric Treatment. However, such coerced false statements to the Physicians and other Healthcare Professionals to engage unknowingly in Fraud and deceit upon the Medicare Program and the Petitioner. Therefore, the Government, with Confidential Secret Information caused the violation of the Petitioner's Employee Safe Harbor Protection. For example, the Petitioner an employee, was not informed "During the Investigation, Trial, nor during Sentencing, that the Government had engaged in such "Employment of Manipulative and Deceptive Devices." Although

the Government Falsey lead the jury to believe that the Petitioner was responsible for such Government Created Fraud when he signed "The Medicare Compliance Agreement" on behalf of the Corporation. (i.e Not For His Benefit...).

Thus, it was the Government that caused the Fraud and Deceit in violation of the Petitioner's Equal Opportunity Right to comply with § 56.9 Ensuring Compliance with this Part of Federal Financial Assistance Programs and Activities.

However, the Petitioner contends that from the beginning of its Highly Secretive Confidential Investigation he was an Employee for Riverside General Hospital. The Petitioner was employed as the CEO/President by Hospital Board of Directors. Therefore, the contention that the Petitioner shall be held Responsible for conduct of his Superiors (i.e. Board of Directors...) as the employer of the Corporation and the Executive Board of the Medical staff and Chief of the Medical Staff was certainly an "Example of Miscarriage of Justice," on behalf of the Government. Accordingly, the Petitioner contends that all of his duties complied with § 404.1007 Common Law Employee status.

(b) Factors that show employee status. Some aspects of a job arrangement that may show you are an employee are as follows:

- (1) The person you work for may fire you.
- (2) The person you work for furnishes you with tools or equipment and a place to work.

- (3) You receive training from the person you work for or are required to follow that person's instructions.
- (4) You must do the work yourself.
- (5) You do not hire, supervise, or pay assistants (unless you are employed as a foreman, manager, or supervisor).
- (6) The person you work for sets your hours of work, requires you to work full-time, or restricts you from doing work for others.
- (7) The person you work for pays your business or training expenses.
- (8) You are paid by the hour, week, or month.

However, the Government during the Petitioner's trial "Contended Falsey" that the Petitioner was the Owner and he was responsible for the conduct of the Medical Staff and other related Healthcare Professional(s) (i.e. Physician Assistants, Nurse Practitioner, Master Level Social Workers etc...). The Principal Officer for the corporation is its Governing Board of Directors or Board of Trustees. The Medical Staff reports directly to the Chief of Specific Division within the hospital. For example, a patient medical complaint will be forwarded to Chief of that Division (i.e. Chief of Psychiatry Division). Subsequently, all such complaints are then forwarded to Medical Staff Executive Board, then all unresolved and resolved issues are forwarded to the Board of Directors for resolution in compliance with state law(s) and compliance with the state of Texas Medical Board.

The Petitioner (i.e. an Employee) has no authority to oversee the responsibilities and duties of the Physicans and Healthcare Professionals that are under the supervision of the Physicians. (See Ganji...) In addition, ultimately all such Final Authority resided with the Petitioner's Corporate Board of Directors.

Consequently, the Petitioner contends that the Government violated § 56.9 Ensuring Compliance With This Part Of Federal Financial Assistance Programs And Activities. Whereas the Government confidentially and secretly during the investigation of the Petitioner caused violated section of section (e). Therefore, with "Money" the Government caused intimidation and interference with Vulnerable Older African American Men and Women's Right to Psychiatric Medical Treatment. Accordingly, the paying of these patients by the Government assured that these Elderly Vulnerable African Americans (i.e. Patients) would not retaliate against the Government during the Investigation by "Filing a Complaint."

The Petitioner contends that the Psychiatrists are ultimately responsible for any patient whom are attending the PHP. For example, in O'Neill v. Grayson County War Memorial Hospital, (1973 CA 6 Ky) 472 F.2d 1140 were properly dismissed by the Board of Directors. Whereas, Physician's action against hospital's Board of Directors, alleging denial of due process and equal protection by hospital's action in discharging physician from hospital staff and refusing to accept any of his patient for admittance, held properly dismissed in view of fact that statute affords relief only where incidious discrimination is class-based, and where physician's

complaint merely asserted that standards applied to him, individually, in his dismissal were purposefully different from standards applied to other physicians on hospital's staff. However the Petitioner contends that the Government caused him "The Employee," not the BOT, nor the Physician be held responsible for False Evidence provided by patients that the Government forced them to Falsify. In addition, the Petitioner contends the hospital employees provided services that the Government through these Vulnerable Older African American patients were inhumanely forced to personally verify. Therefore, the Petitioner contends that the Petitioner should not be liable for services that were received that both Patient and Physician Verified that were needed. (See Ganji)

V. GOVERNMENT'S DIRECT ENTRAPMENT ATTEMPTS

Thus, to assure a Wrongful Conviction of the Petitioner an Employee, the Government violated his Fifth, Sixth and Fourteenth Amendment Rights. Whereas the Supreme Court has ruled that "the clear rule of Massiah is that once adversarial proceedings have commenced against an individual, he has the right to legal counsel when the Government interrogates him." Brewer v. Williams, 430 U.S. 387, 398 (1977). Quoting Kirby v. Illinois, 406 U.S. 682 (1972). In Brewer, 430 U.S. w 399; Justice Stewart who delivered the opinion of the court; went on to state that "the clear rule of Massiah is that once adversarial proceedings have commenced against, an individual, he has the right to legal counsel representation when the Government interrogates him." In Henry 447 U.S. at 271 the court found that "conversation stimulated in circumstances may elicit

information that the accused would not intentionally reveal."

"And that by intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel; that the Government violated Henry's Sixth Amendment Right to counsel.

"The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (Bruton v. United States, 391 at 139-140, 20 L Ed. 2d 476, 88 S. Ct. 1620 (White, J, dissenting)).

For example, as presented in the Petitioner's initial petition unlawful interrogation and attempt of entrapment by the Government. Thus utilizing multiple ill gotten incriminating untrue statements. "Accordingly in violation of the Petitioner's Sixth and Fourteenth Amendment Rights. Subsequently these false statements were utilized falsely in trial to prejudice the court and jury. Thus violating the Petitioner's rights to Due Process and a Fair and Just Trial. (See Affidavit 19). Agent Khirier acknowledged that she did not tell the Petitioner about PHP investigation(s) that were underway. (pg. 235) Agent Khirier talked to the Petitioner about multiple things. (pg 246) Thus agent Khirier stated, "I am not required to inform witness or targets." (pg 246) Thus agent Khirier violated the Petitioner's Constitutional Right to Counsel. (U.S. v. Kennedy, 372 & 3d 686, 693 4th Cir. 2004). Accordingly, the Govern-

ment intentionally created a situation likely to induce the defendant to make incriminating statements Without the assistance of counsel. For example, agent Khirier "Falsely" stated to the Jury that Petitioner stated that he (i.e. Petitioner the "Employee") actually owned the hospital.

VI. GOVERNMENT, KAHN, BULLOCK, FUGERSON, CLARK, ASKEW, PRESENTATION OF FRAUDULENT DOCUMENTS

Whereas, the Government "Highly Secretive Confidential Scheme" included secretly participating, causing and allowing the Petitioner with "Deliberat Indifference" for his Corporation purchasing a business that the Government, Kahn, Bullock, Fugerson, Askew, Clark and all of the other Secret Conspirators was participant. However, the Government then knowingly caused the Coconspirators and Petitioner to be charged as a coconspirator with Bullock and Clark and others for their theft of Hospital property and charge the Petitioner as a coconspirator..

For example, Leslie Clark, William Bullock and Cynthia Bullock, William Bullock's wife, created the name Oasis Outreach to default Riverside Hospital. According to the FBI report both Leslie Clark and William Bullock were addicted to drugs and were known drug addicts. There were no outreach activities, there were no personal care homes nor was there a boarding house owned by Oasis. Leslie Clark served as an Administrative Billing Specialists at Dynamic and Caroline. Contrary to her testimony to the Jury she worked as Billing Specialist until June 6th , 2011. Leslie Clark and William Bullock did not recruit patients for Oasis. They created false patient lists to bill from. Some of these patients were admitted.

to Dynamic before Oasis ever existed. (See RGH.0773) Some of these alleged patients were NEVER at Dynamic PHP or Caroline PHP. Patients NEVER lived at Oasis.

IN COURT Ms. Clark stated that her patients (1-23-12) are sitting at home waiting to be admitted so that she could receive more fraudulent funds from Riverside Hospital.

David Aleman	Discharged	5-23-11
Barbara Provazak	Discharged	6-8-11
Clayton Podgett	Discharged	6-15-11
Kat Coleman	Discharged	5-19-11
Matthew Lambert	Discharged	10-7-11
Flodine Smallwod	Discharged	5-31-11
James Stokes	Discharged	10-28-11
Alasia Smith	Never Admitted	
Ayinde ATU Richmond	Never Admitted	

Ms. Clark and Mr. Bullock also falsely placed the following patient on the Oasis list. It should be noted that these patients existed before Oasis was in existence.

Flodine Smallwood	Admitted	7-20-10
James Stokes	Admitted	11-04-09
Henry Williams	Admitted	11-08-10
Emmett Schuker	Admitted	11-08-10

There was NEVER an Oasis Boarding House and or Rental House. Leslie Clark and William Bullock created the fraudulent Oasis Outreach list so that they could continue to receive payment for patients that either did not exist, were not admitted, or that were never billed on. Ms Clark made the list of patient(s) who attended or had

attended Dynamic and put them on the Oasis Outreach List. Ms. Clark stated that one client(s) did not attend the program because of transportation problems (i.e. no ride).

Leslie Clark not only and Bullock not only made up this fictitious and fraudulent list as a /biller in her transcript, she stated that Khan fired her. The reason he fired her is because he caught her stealing. As an Administrative Billing Specialist employee she was verifying her own falsified list of patients. Ms. Clark stated that her patients were sitting at home waiting to be admitted. (2010...discharged in 2011). Moreover, patients were not sitting at home as Ms. Clark stated in court they had been discharged from the Program.

Patients admitted to Dynamic PHP before Riverside's purchase. Riverside Hospital was fraudulently consistently billed for marketing however; the patients were admitted prior to the purchase. It should be noted that Riverside was consistently billed and no work was done. See GOV. Exhibit 318 and 319. Dynamic DID NOT EXIST in 1/16/2006 (examples of patient just placed on list) There was No evidence that any patients came from the home. Likewise as previously noted Oasis Outreach created fraudulent bills to Riverside Hospital.

LESLIE CLARK Transcript 09/24/2014

09:16:24 lines 9-10 "Oasis was the entity that I created so that I could get paid for patients under the name of Oasis"

09:13:35 lines 10-12 "What do you mean Aleman?"

He was one of Oasis patients. He was one of the patients I was paid for. He was one of the patients I was paid for. Newly Discovered Evidence shows us that Oasis Outreach was created April 30, 2011.

Accordingly to Government Exhibit 303 [Summary of PHP Medicare Claims from RGH for January 2005 through June 2012]. Aleman was admitted in March 7, 2011. This shows that Aleman was a pre-existing patient in Dynamic's PHP before Oasis Outreach even existed. Not only did Ms. Clark commit perjury to the Court, but she also lied, cheated and stole from Riverside Hospital by submitting false and fraudulent claims to Riverside. Ms. Clark lied and used her authority of Administrative Billing Specialist in order to submit false claims for her and William Bullock's own personal benefit. As previously noted, Kahn fired Ms. Clark.

She was aware that William Bullock, her co-conspirator and business partner, created false Check Request forms and submitted those false forms in order to continue to support their continued drug habit.

11:48:48 lines 13-16 Clark stated that the 13 people from the Oasis Outreach list "did attend" Mr. Kahn's PHP and that she was the one responsible for bringing them there. Newly Discovered Evidence shows that these patients were already admitted to Dynamic PHP before Oasis Outreach even existed. SEE EXHIBIT 9

Clark was NOT hired to do Outreach for Riverside Hospital; she was hired as a Billing Specialist Administrator. While Leslie Clark claimed that she was out doing outreach, she was actually doing billing as a contractor for Riverside. Again, this is more

falsification of Clark claiming that she was doing outreach. Instead, she was submitting false patient names for Oasis Outreach for she and William Bullock's own personal gain. (Bullock was one of the owners of Dynamic).

09:16:24 Lines 9-10 ms Clark stated that Oasis was the entity that she created so that she could get paid for patients.

Therefore, the Government was allowed to charge the Petitioner as a Coconspirator with Bullock and Clark. However, the Government knowingly allowed Clark to present fake evidence to the Jury. However, the Government did not present no evidence relative Bulliard. The Government did not present "no patients for marketing nor marketing checks on behalf of Riverside." Whereas, during deliberations the jury asked the court "could they separate the conspiracy with Bullock and Clark?"

Whereas, the Petitioner further contends that BOT'S duties and responsibilities are inheriant exclusively in Riverside Hospital's BOT and State Law(s) is clearly illistrated in Sukle v. Madison General Hospital, case.

Private, nonprofit hospital, by virtue of its articles of incorporation, bylaws, customs and usages, contracts, and sources of funds, held to be so interrelated with city government that its actions in terminating physician's staff privileges were actions performed under color of state law; deprivation of membership on hospital's staff and termination of physician's privileges thereon constitute deprivation of physisian's liberty and property within meaning of due process clause, requiring some minimal procedural

protections; however, Constitution does not require that decision-making process under which renewal of staff rights is made be as antiseptic in this context as it is required to be in criminal prosecutions. Suckle v. Madison General Hospital (1973, WD Wis) 362 F.Supp 1196, affd (1974, CA7 Wis) 499 F.2d 1364.

"Incidentally the Board of Directors Responsibilities and Authority can also be illustrated in Barrio v. McDonough Hospital Case."

"Suspension of physician from staff of state-regulated private hospital by action of Board of Directors is not "conspiracy to deprive person or class of persons of equal protection of the laws" under 42 USCS § 19853(3) absent showing of existence of "class-oriented, invidious animus" against plaintiff rather than animosity against him as individual. Barrio v. McDonough Dist. Hospital, (1974), SD Ill) 377 F.Supp 317."

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Thus, the Petitioner also contends that his attorney was ineffective for not providing evidence of his Employee Rights. The Petitioner contends his responsibilities and authority as an Employee of the corporation would have provided factual evidence the conduct and authority that the Government contends was the Petitioner's was clearly vested in his superior "The Board of Trustees" (i.e BOT bylaws). In addition, the Petitioner's attorney failed to produce his employment contract nor any annual performance evaluations. Both would have assisted in providing evidence that

the Petitioner consistantly performed his employment duties and responsibilities. Thereby, assuring the court and the jury the Petitioner should not have been charged for a Government proximate crime he had no knowledge, authority or responsibility to oversee. Accordingly, also such authority was vested in his Superior "The Corporate Board of Trustees." Thus, the Petitioner strongly suggests that the Non Action of his counsel, "Employee Status" was prejudicial to his right to effective assistance of counsel under the Sixth Amendment.

During the Petitioner's trial the Government contended that the Petitioner was Deliberate Indifference. In addition, the Government contended that the Petitioner "the Alleged Owner" was heavily involved in Devotion (i.e. PHP Private Contractor Business with Riverside...).. However, excerts from the investigation conducted by Epstein, Becker and Green Law Firm, on behalf of Riverside Hospital Board of Directors clearly "Reveal the Truth."

(See EBG Investigation Ex. 18) Accordingly, EBG Investigation revealed that Petitioner was not involved in Devotion and Riverside contract relationship. In addition, the investigation also revealed that Devotion complied with contract obligation to Riverside Hospital and Medicare Regulations. In addition, the investigation demonstrated that all of the compliance relative to the interactions between Devotion, was performed by the Chairman of Riverside BOT, Compliance Officers, and Administrative Staff.

Incidentally please see (i.e. Epstein, Becker and Green Investigation Report pg____). Reference to the fact that known pat-

ients in Kahn's own program being secretly provided care in Riverside PHP Outpatient Facility. Also, see Kahn's Medicare operation scheme pg 6. However, Riverside Hospital paid for services that Kahn secretly billed by utilizing his own (See Kahn Pin #) However, Kahn secretly received the funding from Medicare just like the funding Kahn received for services that Riverside Laboratory employee(s) provided (i.e. see pg).

However, the Petitioner contends that his attorney(s) failure (1) To investigate Kahn's participation in his own scheme, (2) Secure all Government Kahn related evidence, (3) Failure to interview Kahn prior to trial is evidence of Ineffective Assistance of Counsel (i.e. Strickland v. Washington, 466 U.S. 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Thus, the Petitioner contends that the Government violated U.S.C. 42 § 12101. Whereas, Congress finds that _ _ (1) Physical or Mental disabilities in now way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; Others who have a record a disability or are regarded as having a disability also have been subjected to discrimination. _ _ _ (i.e., including (2), (3), (4), (5), (6), (7), (8),)(i.e., See U.S.C. 42 § 12101...) In addition, the Government violated the purpose (i.e., (1), (2), (3)_ _). Similiarly, according to U.S.C. 42 § 12101b(4) Congress invoked the sweep of Congressional Authority, including the power to enforce the Fourteenth Amendment and to regulate, in order to address areas of discrimination faced day-to-day

by people with disabilities, (i.e., See U.S.C. 42 § 12101.).

Moreover, the Government confesses that it forced Vulnerable, Older, African Americans to undergo Psychiatric, Mental Health and Substance Abuse Treatment(s).

Whereas, the Government then falsely created the need for § 5122 Emergency Act. Thus, with federal assistance the Government created "Proimate Evidence" to supplement falsified State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States. Therefore, with the highest level of secrecy and confidential human resources etc... (CHS etc...). The Government(s), Federal, State, City, County, created the crime. However, although knowing that the Petitioner had already retained legal counsel, the Government on multiple occasions attempted to Entrap the Petitioner (i.e., The Employee).

Moreover, when the Unlawful Multiple Attempts failed, the Government falsely accused the Petitioner with "Deliberate Indifference." Accordingly, the Government violated U.S.C. 18 § 1954 by offering the Patients "Money to influence the operations of the Employee benefit plan. In addition, the Government secretly violated U.S.C.S. § 664 Theft or Embezzlement From Employee Benefit Plan.

However, the Government then flaselv accused the Petitioner for acceptance of his Bona Fide salary for services actually performed in his duties as employee (i.e., Administrator) by being Deliberate Indifference to the Governments Highly Confidential Fraudulent Secretive Scheme. Therefore, the Petitioner, the Employee for the Corporation (i.e., Riverside Hospital..) Rights to § 184- Strict Construction of the Laws Creating Crimes was violated. Accordingly, the Government held the Petitioner (i.e., Earnest Gibson III), the Employee, Legally Responsible for Authority "Clearly Vested in Superiors (i.e., Board of Trustees) and Executive Committee or Riverside Medical Staff.

However, such misuse of statute(s) by the "Government creating flase crimes" "ARE TO STRICTLY BE CONSTRUED IN FAVOR OF THE ACCUSED AND MAY NOT BE HELD TO EXTEND TO CASES NOT COVERED BY THE WORDS USED." Similarly the Petitioner was Employeed by Riverside General Hospital (i.e., RGH). RGH was a 501(c)(3) Nonprofit Hospital. However, according to 42 § 12501 Congress finds Nonprofit Organizations are already supporting a variety of National Service Programs that deliver needed service in a cost - effective manner.

Therefore, the Petitioner an Employee for Riverside Hospital was one of those Nonprofit Corporations that was providing such needed services in a cost-effective Legal manner. Consequently, the Government was forced with Highly Secretive Confidential Sources to create proximate evidence to unfairly convict the Petitioner an "Employee" of the Corporation for duties and responsibilities he was not Employeed to perform.

The Petitioner contends that his case is "A Clear Evidence of injustice." For example, after the Petitioner's trial the government acknowledged that with the highest Level of Secrecy it had violated the very Law(s) it had sworn to uphold. However, the Petitioner only discovered the government acknowledgment of its own conspiracy on approx 2017. Whereas, on this date the Petitioner was reviewing his PSI and discovered that the evidence had been placed in his PSI. In addition, the Petitioner contends that during (1) Pretrial Hearing, (2) Trial Proceeding, (3) Sentencing the Government never acknowledge its involvement in the creation of the crime against the Petitioner. In addition the Petitioner was never informed by his attorney (i.e. Dick Deguernin) that he had any knowledge nor evidence of the government's highly secretive confidential scheme. Therefore the Petitioner was Denied that Evidence to properly defend the Petitioner. Accordingly, the Government secretly "owned-maintained Personal Care Home Facilities." Therefore, the government's secretly involvement of maintaining these Personal Care Home(s) would assist in its conspiracy scheme. Therefore, the government maintaining control of these facilities for the Vulnerable Elderly Older African American Men and Women was to assure the violation of the "Elderly and Petitioner's," Constitutional and Due Process Rights.

Consequently, the government caused the violation of these Elderly Vulnerable Humans and the Petitioner's Constitutional Rights (i.e. I Amendment, XIII, and IVX Amendment Rights...). Moreover, the government caused the violation of these Older Vulnerable African American Men and Women who lived in these facilities Rights to None (1) Interference, (2) Coercion, (3) Discrimination or (4) Reprisal

from the facility owner or government (i.e. Federal or State etc...). Furthermore, the Petitioner contends the Government violated § 483.10 Resident Rights.

(a) Resident Rights. The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility, including those specified in this section.

(1) A facility must treat each resident with respect and dignity and care for each resident in a manner and in an environment that promotes maintenance or enhancement of his or her quality of life, recognizing each resident's individuality. The facility must protect and promote the rights of the resident.

(2) The facility must provide equal access to quality care regardless of diagnosis, severity of condition, or payment source. A facility must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services under the State plan for all residents regardless of payment source.

(b) Exercise of rights. The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States.

(1) The facility must ensure that the resident can exercise his or her rights without interference, coercion, discrimination, or reprisal from the facility.

(2) The resident has the right to be free of interference,

coercion, discrimination, and reprisal from the facility in exercising his or her rights and to be supported by the facility in the exercise of his or her rights as required under this subpart.

Incidentally, the Petitioner contends that access to the evidence of the violation and all of the above rights of the Petitioner were violated. Whereas, all such Secret Exculpatory Evidence Remained Secret During All of Petitioner's Proceedings.

VIII. RECENT FIFTH CIRCUIT APPEAL COURT RULING(S)
APPLICABLE TO PETITIONER'S CASE

Whereas, the Petitioner contends that his case is a replicate of the Fifth Circuit United States of America, Plaintiff-Appellee v. Doctor Pramela Ganji; Elaine Davis: Jan 30th 2018. For example, in Dr. Pramela Ganji and Elaine Davis's case the defendants convictions for violating 18 U.S.C. §§ 1349 and 1347 were Reversed and Vacated since the Government's concerted action evidence fell well short of the threshold met in Arredondo-Morales and the Grant decisions, and a defendant could not be held liable for fraud as a result of activity that was legal. "However, it should be noted that in the Petitioner's case the Government's concerted effort was the actual cause (Proximate Evidence of the Crime). But the misapplication of physician duties and responsibilities were the same.

Furthermore, Dr. Ganji provided testimony of her innocence that went unanswered by the Government. Dr. Ganji's extensive, undisputed testimony differentiated her forty-year practice from Dr. Murray's. The Government presented evidence that Dr. Ganji

rarely personally visited the patients she certified. In response, Dr. Ganji, who cared for patients in her private practice, at nursing homes, and at other home health care agencies, testified that nurse practitioners conducted the visits when she could not. When asked if she "believed that his face-to-face encounter with the nurse practitioner was permissible, Dr. Ganji answered, "Yes." This statement was not rebutted by the Government and this practice is allowed by the regulations. 42 C.F.R. 424.22.9.

Accordingly, the Petitioner contends that in his case, just like Dr. Ganji and Davis, Riverside General Hospital and its Medical Staff provided PHP services as required by federal regulations (42 C.F.R. § 410.27), Therapeutic Outpatient hospital of CAH Services and supplies incident to a physician or non-physician practitioner's service: Conditions. Which States: "(2)(iv)(E) For nonsurgical extended duration therapeutic services (extended duration services), which are hospital or CAH outpatient therapeutic services that can last a significant period of time, have a substantial monitoring component that is typically performed by auxiliary personnel, have a low risk of requiring the physician's or appropriate nonphysician practitioner's immediate availability after initiation of the service, and are not primarily surgical in notion, Medicare requires a minimum of direct supervision during the initiation of services which maybe followed by general supervision at the discretion of the supervising physician or the appropriate nonphysician practitioner. Initiation means the beginning portion of the nonsurgical extended duration therapeutic services which ends when the patient is stable and the supervising physician or the remainder of the service can

be delivered safely under general supervision." Thus, the Petitioner contends just like in Dr. Ganji's case his PHP facilities complied with the Physician(s) Requirements.

For example, the Petitioner contends that he was an employee for Riverside Hospital. In addition, he reported to his supervisors, the Board of Trustees. Whereas, the Hospital maintained a medical staff that also reported to Board of Trustees. For example, Davis an owner was in superior position to provide conspiracy.

Thus, to prove conspiracy, the Government must prove beyond a reasonable doubt the defendant knew of and participated in an agreement to commit a crime. It is not enough that the Government proves that the defendant knew something criminal was afoot. Alvarez, 610 F.2d at 1257. The Government presented evidence that Davis was an accountant and Christian's owner, and her duties included signing checks and filling staffing positions. It argued that, as such, Davis had significant oversight at Christian and the jury rightfully rejected her argument that she was unaware of any fraudulent certifications. In essence, the Government argued that the jury could infer that Davis had knowledge of the fraudulent activity and agreed to participate because one in that position should have known that some of Christian's nurses recruited and some of its medical directors certified patients who were not eligible for home health care services. Notably, the Government offers no case support for its argument.

The Government's attempt to ascribe Davis with knowledge and agreement because of her position in the company falls far short of the necessary requirement for guilt beyond a reasonable doubt. One

cannot negligently enter into a conspiracy. See Snow Ingredients, Inc. v. SnoWizzard, Inc., 833 F.3d 512, 526 (5th Cir. 2016) ("Civil-RICO conspiracy, however, cannot be premised on negligence. It requires an actual agreement between conspirators-they must specifically intend the illegal conduct."); see also Model Penal Code § 5.03 cmt. 2(c)(i)(1985) ("When recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime...there could not be a conspiracy to commit that crime.").

Furthermore, Davis testified that she did not have any medical training, was not qualified to make diagnoses, and depended on Christian's medical professionals "one hundred percent" in medical matters. She further testified that "the administrative office... confirmed the patients Ms. Hendricks and Ms. Clestine had brought in." The Government did not provide evidence refuting the testimony that Davis had little involvement in Christian's administrative matters and no involvement in its medical matters. It instead continuously pointed to Davis's payroll participation to illustrate her oversight at Christian and prove her participation in the conspiracy. This activity is insufficient to support an inference that she agreed to join Dr. Murray and the nurses' fraudulent activity. The Government had to prove that she knowingly agreed to participate in a common scheme to meet an unlawful goal. See Monsanto, 465 U.S. at 754. The evidence did not prove that Davis committed actions sufficient to show an agreement to defraud Medicare beyond a reasonable doubt.

Thus, Petitioner note that his actions were very similar to

Davis. Whereas, the court ruled that Davis's actions were nothing like most directors involved in other health care fraud cases. She testified that she did not participate in the day-to-day activity of processing the certification forms, which was completed by the administrative office. But see, e.g., United States v. Fuchs, 467 F.3d 889, 897 (5th Cir. 2006)(owner filled prescriptions for hydrocodone after his company generated the prescriptions online and paid a doctor, who never examined the patients, to approve them). The contract between Christian and the medical directors provided for a flat rate, and, in accordance with health care regulations, that rate did not fluctuate based on the amount of patients the doctor referred. But see, e.g., United States v. Dailey, 868 F.3d 322, 326 (5th Cir. 2017) (owner admitted to paying the doctor in exchange for signing certification forms without supervising the physician's assistant and testified that the doctor withheld forms if not paid). The record does not indicate that Christian paid doctors to sign documents. But see, e.g., Grant, 683 F.3d at 643-44 (5th Cir. 2012)(director paid doctor to re-sign forged prescriptions for medical supplies). Furthermore, according to testimony, Davis's salary was, at most \$120,000. The Government provided no evidence that she received funds beyond her salary. So while the Government alleges that Medicare paid Christian an average of \$3.5 million a year during the scheme, Davis only amassed 3.4% of those alleged ill-gotten gains.

Although the Government presented a plausible scheme of fraudulence, it did not implicate Davis in the scheme with proof beyond a reasonable doubt. The Government did not present sufficient ev-

idence to allow any rational juror to infer that Davis agreed to participate in a conspiracy to commit health care fraud. As such, we must reverse. "Likewise the Petitioner was only paid according to his salary. (i.e. not including % on BOT Loans to Hospital)."

Accordingly Recent Ruling Relative to Conspiracy has Changed. For example, what people must be logical, albeit, circumstantial, evidence of what lies in their mind. As such, the law has evolved to accept concerted action when a formal agreement cannot be found. Nevertheless, that concert of action must illustrate a conscious commitment to a common scheme designed to achieve an unlawful objective. The actions and the surrounding circumstances must be incriminating enough to warrant a finding that the government proved the existence of an agreement beyond a reasonable doubt. The actions surrounding the defendant and the co-conspirators' conduct, taken together, must show they intentionally entered into an agreement. Concerted action between the conspirators illustrates that an agreement had to exist because the individuals would not have otherwise acted in that particular manner.

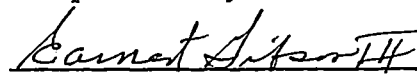
Concert of action can be proven through indirect, circumstantial evidence. However, when proving an agreement exists by using the concert of action theory, the government must present evidence of the conspirators' individual actions that, taken together, evidence an agreement to commit an unlawful objective beyond a reasonable doubt.

The Petitioner contends as the contract employee of the multi-level hospital system he had no responsibilities for day-to-day

operations over the PHP(s). In addition, the Petitioner had no day-to-day operation over the Hospital billing practices for PHP services. All such services was performed in the Business Office under the Business Officer Manager, Assistant Manager and Supervisor. In addition, the Petitioner had no responsibilities nor oversight of physicians and other related healthcare practitioners. Nevertheless, the Government accused the Petitioner of being Deliberate Indifference when he had no employee related responsibility to physicians nor maintained any medical care knowledge, nor qualified to make medical diagnosis. Thus, like both Davis and Ganji, the Petitioner depended one hundred percent (i.e. 100%) on the physicians for patient related PHP diagnosis and admissions. In addition no physician received any additional funds for patients being referred to the Hospital PHP(s). Thus, the Petitioner did not provide any incentive to physician(s) nor health care practitioners (i.e. or others) to refer patients to the Hospital's PHP(s).

In conclusion, the Petitioner contends he cannot commit fraud unless the physician inform him of its fraudulent conduct and he then refuse to inform the medical staff and/or his superiors, "The Board of Directors."

Respectfully Submitted



Ernest Gibson III, Defendant Pro Se

CERTIFICATE OF SERVICE

I, Earnest Gibson III, hereby declare under penalty of perjury that I placed a true and correct copy of the foregoing: PETITIONER'S MOTION TO AMEND MEMORANDUM OF LAW IN SUPPORT OF THE PETITION UNDER U.S.C. § 2255, with postage prepaid and affixed on this 3rd day of February 2020, and properly addressed to the following:

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BOB CASEY UNITED STATES COURTHOUSE
515 RUSK STREET, ROOM 5300
HOUSTON, TEXAS 77002-2600



Earnest Gibson III, Petitioner Pro Se
Reg. No. 24386-379
Federal Correctional Complex
P.O. Box 3000-Medium
Forrest City, AR 72336

PRIVILEGED & CONFIDENTIAL

Mr. Gibson,

Please find attached a copy of Mr. Khan's Plea Agreement. I will call you in a few minutes regarding an additional step that we would like to take relative to the information contained in the Agreement.

Best regards,
Dan

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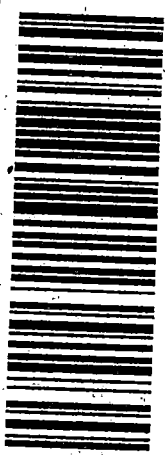
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